

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

**PATRICK HENRY MURPHY JR.** §  
§  
Petitioner, §  
§  
§  
-vs- § CIVIL NO. 3:09-cv-01368-L  
§  
§ \*DEATH PENALTY CASE\*  
§  
**LORIE DAVIS**, Director, §  
Texas Department of Criminal Justice, §  
Correctional Institutions Division, §  
§  
Respondent. §

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**REPLY TO RESPONDENT'S RESPONSE IN OPPOSITION TO  
MOTION TO ALTER OR AMEND THIS COURT'S  
MEMORANDUM OPINION AND ORDER DENYING RELIEF ON  
MURPHY'S PETITION FOR A WRIT OF HABEAS CORPUS**

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In her Response in Opposition, Respondent mischaracterizes Murphy's claim. This mischaracterization is significant, and it is the same mischaracterization committed by both the Magistrate in his findings and this Court in adopting the Magistrate's findings and conclusions. Specifically, Murphy's claim is *not* that his being convicted

of capital murder violated *Tison*. Murphy's claim (which is the same now as it was when he raised it as the eighteenth claim in his direct appeal brief) is that *Tison* requires that for a person to be eligible for death, he had to have knowingly engaged in some activity; however, the verdict form presented to Murphy's jury did not require the jurors to make this finding.

While Murphy in no way concedes that Respondent is correct that the Fifth Circuit's opinion in *Williams v. Thaler*, 602 F.3d 291 (5th Cir. 2010), effectively held that motions filed pursuant to Rule 59(e) are to be reviewed under all the same rules as those filed pursuant to Rule 60(b), Response at 10, even if that were the case, Murphy's claim is not a successive petition.<sup>1</sup> Murphy's motion does not attack this Court's ruling on the merits of his claim. Rather, Murphy's motion alleges the Court erred in not addressing the merits of his claim because the Court and the Magistrate misconstrued his claim.

### **Conclusion and Prayer for Relief**

WHEREFORE, Mr. Murphy prays that this Court:

1. Withdraw the portion of its March 31, 2017 memorandum

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<sup>1</sup> The holding in *Williams* seems to be limited to mandating that new claims raised in a motion filed pursuant to Rule 59(e) be construed as successive. Murphy's motion contains no new claim.

opinion and order finding Murphy's first claim is procedurally barred;

2. Find Murphy's claim is exhausted and procedurally viable;
3. Withdraw the alternative merits holding for which the Court offered no explanation;
4. Address the merits of Murphy's claim; and
5. Grant such other relief as law and justice require.

Respectfully submitted,

s/ David R. Dow

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### **Certificate of Service**

I certify that June 1, 2017, a copy of the foregoing pleading was electronically served on counsel for the Respondent by filing the document with the Clerk of the Court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court.

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s/ David R. Dow

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